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Office Memorandum • UNITED STATES GOVERNMENT

TO : Mr. Livingston T. Merchant

FROM : Martin J. Hillenbrand *[initials]*

SUBJECT: Western Rights and Western Objectives in Berlin

DATE: June 8, 1969

There has been a great deal of discussion at this conference about our "rights" in Berlin, and recent private meetings have focused largely on whether the Soviets will or will not explicitly reaffirm these "rights". So far at least Gromyko has been willing to go no farther than to say that the Soviets are suggesting neither the affirmation nor the denial of "Western rights".

It may be helpful in clarifying our own thinking to analyze further this concept of "rights". Western "rights" may be broken down into five categories:

(1) Our right of presence in West Berlin (this right deriving from conquest is presumably our basic right and is essentially what is in dispute between the Foreign Ministers thus far.)

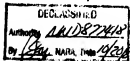
(2) Our reserved rights which we continue to exercise in West Berlin as occupying powers (the basic right here is that of taking measures necessary to protect our security and includes broad immunities from local police jurisdiction without which our intelligence and related activities in the city could not be carried on in the same manner as at present). These are rights, the exercise of which we can limit at our own discretion, just as we did in the Federal Republic prior to the going into effect of the Paris Agreements.

(3) Our rights of free access by land and by air. (These we claim are a logical and necessary corollary of our right of presence in Berlin. The specific modalities of their exercise, however, are governed by Four Power agreements and a whole host of arrangements made over the years between the Western Powers and the Soviets.) Without the ability to exercise these rights, the Western Powers are ultimately faced either with the necessity to maintain some sort of airlift under blockade conditions, to contemplate withdrawal from Berlin or the application of force.

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(4) Residual rights asserted on the basis of the defunct Four Power administration of the Greater Berlin area (while these are unenforceable rights, they have provided the basis for Western protests against unreasonable hindrances at the sector-sector boundary to movements between East and West Berlin as well as providing the basis for Western protests against "militaristic demonstrations" in East Berlin).

(5) Rights relative to German civilian traffic to Berlin which stem from our responsibilities as an occupying power for the welfare of the people of Berlin. (It is these rights which provide the basis for Allied protests against Soviet or GDR interference with civilian traffic to Berlin. While such protests have been made over the years at such times as the Warenbegleitschneise crisis, the road toll crisis and the canal barge crisis, the Western Powers have actually been unable to enforce them and have, in effect, acquiesced for many years in complete East German control of West German and West Berlin civilian traffic on land and water.)

If the present conference breaks up without agreement and there is no Summit meeting, we may expect that the Soviets will proceed fairly rapidly to sign a peace treaty with the GDR and to withdraw entirely from East Berlin and from the Autobahn and rail check points as well as from the Berlin Air Safety Center. The Western Powers will then presumably be forced to put into effect their contingency plans drawn up with this situation in mind.

What is the focal point of these contingency plans? It is, as we know, the maintenance of Western access to the city without moving toward recognition of the GDR. If the plans work out as intended they will achieve the continued flow of Western military traffic to and from Berlin as well as maintenance of military and civilian air traffic in the corridors. As German civilian traffic is already under GDR control, the contingency planning which is concerned with avoiding such control for military traffic under conditions implying recognition, does not relate to such civilian traffic. All of the other rights mentioned above will essentially be unaffected by these contingency plans; the Western Powers will presumably continue to exercise these rights as at present -- that is either at their own discretion or as the basis of protests for the record.

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Regarded in this fashion, it is possible to argue that we should consider shifting the emphasis in the private meetings. While the basic Western right is that of presence in Berlin, this right is implicitly maintained under any set of arrangements which permits that presence to continue and does not itself involve an explicit denial or renunciation by the Western Powers. In other words, as long as the Western Powers are physically able to remain in Berlin and continue to assert their right to be there, they are in no worse position than they have been in the last 18 months during which their right to be in Berlin has been denied both by Soviet and GDR propaganda on the ground that all of Berlin is essentially part of the GDR and that the Allies, now that Potsdam no longer is valid, have lost any "right" of presence. Any arrangement with the Soviets which implicitly if not explicitly accepts that continuing presence would seem to be a net gain.

Likewise any arrangement which gives us more assured access under acceptable procedures than we would have in the absence of such arrangement, that is, which enables us to avoid the risks inherent in operating under the contingency plans, would be advantageous for the West.

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